

1 Matthew Campbell  
2 FEDERAL DEFENDERS OF EASTERN WASHINGTON AND IDAHO  
3 10 North Post, Suite 700  
4 Spokane, Washington 99201  
5 (509) 624-7606

6 Attorneys for Defendant

7 UNITED STATES DISTRICT COURT  
8 EASTERN DISTRICT OF WASHINGTON  
9 (HONORABLE LONNY R SUKO)

10 UNITED STATES OF AMERICA, )

11 Plaintiff, )

12 vs. )

13 JOSEPH JEFFREY BRICE, )

14 Defendant. )

CR-11-075-LRS

MOTION FOR EMERGENCY  
HEARING RE: VIOLATION OF  
ATTORNEY-CLIENT AND/OR  
WORK-PRODUCT PRIVILEGE  
AFFIDAVIT OF MATTHEW  
CAMPBELL

15 Mr. Brice, through undersigned counsel, hereby moves for an emergency  
16 hearing regarding violation(s) of attorney-client and/or work-product privilege.  
17 This motion is based upon the facts related in the attached Affidavit of Matthew  
18 Campbell.

19 An emergency hearing is necessary because based on the facts recited in that  
20 Affidavit, it appears that the Government has violated attorney-client and/or work-  
21 product privileges, in violation of the Sixth Amendment. As discussed in the  
22 Affidavit, it appears that the Government seized materials from Mr. Brice's cell  
23 which included legal materials and documents protected from disclosure by

1 attorney-client and/or work product privilege.

2 It may be possible to mitigate the damage caused by those violations if a  
3 hearing is held immediately. Absent a hearing, irrevocable damage may be done.

4 An emergency hearing is necessary in order to prevent the further violation of  
5 attorney-client privilege. The Ninth Circuit has determined that potential violations  
6 of attorney-client privilege may be dealt with at the earliest opportunity, implicitly  
7 recognizing that certain bells cannot be unrung. *See, e.g., Bittaker v. Woodford*, 331  
8 F.3d 715, 716-18 (9th Cir.2003) (*en banc*) (allowing an interlocutory appeal of a  
9 protective order that precluded the use of privileged materials outside the context of  
10 a habeas petition for ineffective assistance of counsel, which petition required the  
11 waiver of the attorney-client privilege as to all communications with the allegedly  
12 ineffective counsel).<sup>1</sup>

13 The purposeful invasion of attorney-client and work product privileged  
14 materials can violate the Sixth Amendment by both communicating the defense  
15 strategy to the prosecution and tainting evidence. *See, e.g., United States v.*

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17 <sup>1</sup> *Bittaker* cites approvingly *In re Ford Motor Co.*, 110 F.3d 954, 962-  
18 64 (3d Cir.1997) (“Appeal after final judgment cannot remedy the breach in  
19 confidentiality occasioned by erroneous disclosure of protected materials.... [T]he  
20 cat is already out of the bag.... [T]here is no way to unscramble the egg scrambled  
21 by the disclosure....”); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1307-08 (7th  
22 Cir.1984) (“Once the Report was released, any error in releasing it would be  
23 impossible to correct.”)  
24

1 *Danielson*, 325 F.3d 1054, 1067 (9th Cir.2003) (citing *Weatherford v. Bursey*, 429  
2 U.S. 545, 558 (1977)). Based upon the facts presently known, a hearing is  
3 necessary to determine the scope of any violation of privilege, as well as to prevent  
4 further violations from occurring.

5  
6 **Conclusion**

7 For the reasons expressed herein, Mr. Brice respectfully requests that the  
8 Court conduct an emergency hearing regarding the violation of attorney-client  
9 and/or work product privilege.

10  
11 Dated: May 22, 2012

12 Respectfully Submitted,  
13 s/ Matthew Campbell  
14 WA 38696  
15 Attorneys for BRICE  
16 Federal Defenders of  
17 Eastern Washington and Idaho  
18 10 North Post, Suite 700  
19 Spokane, Washington 99201  
20 Telephone: (509) 624-7606  
21 Fax: (509) 747-3539  
22 Email: [Matt\\_Campbell@fd.org](mailto:Matt_Campbell@fd.org)

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2 10 North Post, Suite 700  
Spokane, Washington 99201  
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AFFIDAVIT OF MATTHEW  
CAMPBELL

12  
13 I hereby declare under penalty of perjury, pursuant to 28 U.S.C. § 1746,  
14 that:

- 15 1. I am counsel of record for Joseph Brice in this case.
- 16 2. The following affidavit is based upon my own personal knowledge and  
17 my review of materials provided via discovery.
- 18 3. On the morning of May 22, 2011, I received a phone call from Joseph  
19 Brice. Mr. Brice was then housed at the Spokane County Jail.
- 20 4. Mr. Brice informed me that this morning, his cell was searched by  
21 United States Marshals as well as the FBI. Written materials were taken, including  
22 legal materials involved in this case.
- 23 5. Mr. Brice also informed me that after the search, he was transferred to a  
24

1 cell on 6-East, which is on a different floor than he has been housed.

2 6. I contacted the United States Marshals via email to find out what was  
3 going on. I received the following response:

4 I would defer any questions of what was seized or found to the us attorney  
5 smoot or fbi sa mcewen. I can confirm that a cell search was conducted with  
6 the usms role as liaison and determining which materials were privileged  
legal or personal upon cursory inspection. The factors of found material and  
activity lead classification to 6E.

7 7. I then contacted AUSA Russ Smoot and asked why Mr. Brice's cell  
8 was tossed. Initially, he stated he would have to refer me back to the United States  
9 Marshals. I told him that I had already contacted the Marshals and that they had  
10 referred me to him.

11 8. I informed Mr. Smoot that I was concerned about the violation of  
12 attorney-client privilege. Mr. Smoot informed me that he could not provide me with  
13 the answers that I sought at this time. He stated that he wanted to be able to provide  
14 me with complete information, and thus needed to defer discussing the matter for at  
15 least a day.

16 9. I informed Mr. Smoot that I viewed this as a breach of attorney-client  
17 privilege. He stated that no privileged materials had been provided to him. I stated  
18 that to the best of my knowledge, no special master was used. He responded that he  
19 did not believe that the case agent, Agent Leland McEuen, had been given any  
20 privileged materials.

21 10. Mr. Smoot repeated that he wanted to be able to give me complete  
22 information, and needed a day or so. I stated that I did not think this matter could  
23 wait, as once privilege is violated, the bell cannot be unrung.

1 I declare under penalty of perjury that the foregoing is true and correct.

2 Executed on May 22, 2012

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Respectfully Submitted,  
s/ Matthew Campbell  
WA 38696  
Attorneys for BRICE  
Federal Defenders of  
Eastern Washington and Idaho  
10 North Post, Suite 700  
Spokane, Washington 99201  
Telephone: (509) 624-7606  
Fax: (509) 747-3539  
Email: [Matt\\_Campbell@fd.org](mailto:Matt_Campbell@fd.org)

**CERTIFICATE OF SERVICE**

I hereby certify that on March 6, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Russell E. Smoot, Assistant United States Attorney.

s/ Matthew Campbell  
WA 38696  
Attorneys for BRICE  
Federal Defenders of  
Eastern Washington and Idaho  
10 North Post, Suite 700  
Spokane, Washington 99201  
Telephone: (509) 624-7606  
Fax: (509) 747-3539  
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